

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Konitz Contracting, Inc. ) ASBCA No. 52113  
 )  
Under Contract No. F48608-96-D0007 )

APPEARANCE FOR THE APPELLANT: Shane D. Colton, Esq.  
Edmiston & Schermerhorn  
Billings, MT

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF  
Chief Trial Attorney  
Robert P. Balcerek, Esq.  
CAPT Catherine M. Fahling, USAFR  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE JAMES  
ON APPELLANT'S MOTION FOR RECONSIDERATION

Our 26 September 2000 decision granted respondent's motion for partial summary judgment with respect to the "minimum funding" claim under ASBCA No. 52113, holding that the captioned contract is not enforceable as either a "requirements" contract or an "indefinite quantity" contract, and hence appellant was entitled to payment only for services actually ordered by the Government and furnished by appellant, citing *Coyle's Pest Control, Inc., v. Cuomo*, 154 F.3d 1302, 1306 (Fed. Cir. 1998).

Appellant timely moved for reconsideration thereof, arguing that (1) *Coyle's* is factually distinct from Konitz's minimum funding claim because Konitz specifically asked for clarification of the minimum to be funded under the contract, (2) Konitz consistently treated the contract as an ID/IQ contract and had its bonding established accordingly; and (3) Konitz should be allowed an equitable price adjustment with respect to ordered quantities under the FAR 52.211-18 VARIATION IN ESTIMATED QUANTITY (APR 1984) clause. Appellant submitted with its motion, "Exhibit A," comprised of a 9 September 1996 letter from Hoiness LaBar Insurance, Inc. to respondent, stating "[Contract No. F48608-96-D0007] is an indefinite quantity [sic] contract"; a 15 April 1996 performance bond of Great American Insurance Company in the penal sum of \$1,500,000.00; and an unsigned, anonymous memorandum of 27 February 1996 stating that for Solicitation No. F48608-96-B0007 "This will be a Firm Fixed Price AD/IQ type contract." Respondent elected not to respond to the motion for reconsideration.

*Coyle's* is not distinguishable from the instant appeal because the court in *Coyle* did not mention whether the contractor had sought clarification of the contract type, and proof of Konitz's attempt to clarify the intended type for the contract is inconsistent and inconclusive (*see* SOF ¶¶ 21-22). Appellant's "Exhibit A" is cumulative of the

documentation previously reviewed (*see* SOF ¶¶ 2-3, 17-22), and does not reconcile Konitz's intent with the intent of the Air Force. *See Coyle's*, 154 F.3d at 1306.

Moreover, the amount of a performance bond is required to be 100% of the original contract price, which is "the price payable for the specified minimum quantity" *See* FAR 28.102-2(c)(2); *Service Alliance Systems, Inc.*, ASBCA No. 35636, 88-1 BCA ¶ 20,491 at 103,647-48. Thus, the contract's \$1,500,000 performance bond (in "Exhibit A") does not support appellant's interpretation that the minimum amount to be funded to establish the contract as an ID/IQ type contract was 85% of the \$2,543,841.84 estimated, base year amount (*viz.*, \$2,162,265). To the extent Konitz seeks an equitable price adjustment for the option year price, that issue was decided in our 26 September 2000 decision, and no new reason to modify that decision is apparent. To the extent Konitz seeks equitable price adjustments of any of the 54 line items in the option year, no such claim was submitted to the contracting officer (*see* SOF ¶ 12). Therefore, the Board has no jurisdiction to entertain such a claim. *See Larry D. Paine*, ASBCA No. 41273, 93-2 BCA ¶ 25,702 at 127,862.

We affirm our original decision, and deny the motion for reconsideration.

Dated: 20 December 2000

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DAVID W. JAMES, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEPLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 52113, Appeal of Konitz Contracting, Inc., rendered in conformance with the Board's Charter.

Dated:

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EDWARD S. ADAMKEWICZ  
Recorder, Armed Services  
Board of Contract Appeals